

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|--|---|----------------------|
| JAMES DOWNING |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,003,919 |
| U.S.D. 260 |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| KANSAS ASSOCIATION OF SCHOOL BOARDS |) | |
| RISK MANAGEMENT SERVICES |) | |
| Insurance Carrier |) | |

ORDER

Respondent appeals the June 20, 2002 preliminary hearing Order of Administrative Law Judge Jon L. Frobish awarding claimant past and present medical treatment and temporary total disability.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?
- (2) Did claimant provide timely notice of accident pursuant to K.S.A. 44-520 or, in the alternative, was there just cause for claimant's failure to provide notice within ten days of the accident as required by the statute?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant, a custodian, began working for respondent on March 26, 2001. His work with respondent required a lot of overhead activity with his arms and shoulders. At the same time claimant worked for respondent, he was spending 16 hours a week working at the Oak Tree Motel as a janitor.

On April 11, 2001, claimant went to his doctor, Dr. Naldoza, with right shoulder complaints. Medical reports indicated claimant was working quite hard on two jobs. He was diagnosed with either arthritis or bursitis. Claimant sought no additional medical treatment until he returned to Dr. Naldoza on October 11, 2001, again with complaints to the right shoulder. This time he indicated he was cleaning room C21 when his right shoulder popped while cleaning the chalkboard. Medical reports indicated that claimant's shoulder was worse when he performed overhead work.

Claimant continued performing his regular duties for respondent through November 30, 2001. On December 3, 2001, claimant met with Orvie Braland, the head custodian for respondent. He advised Mr. Braland that he was unable to work due to bilateral shoulder pain. Claimant, however, did not claim that his shoulder problems were, in any way, connected with his employment with respondent.

Claimant was examined by Tamara McCue, D.O., on December 5, 2001. At that time, there was an indication that claimant's condition was due to the work performed with respondent, especially the overhead work. Dr. McCue's medical report of December 5 indicated that it was the overhead activities that "really sets off his pain."

Claimant was then referred by Dr. McCue to James L. Gluck, M.D., for an evaluation. Dr. Gluck's December 19, 2001 report also indicates a work-related connection to the activities. Dr. Gluck diagnosed a possible rotator cuff tear. Claimant provided notice to Mr. Braland on December 19 that he felt the ongoing pain was work related.

Respondent contends first that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment. The Board finds the testimony of claimant, along with the medical reports of Dr. McCue and Dr. Gluck, to be sufficiently persuasive that claimant has proven that he suffered accidental injury arising out of and in the course of his employment through a series of accidents ending on November 30, 2001, his last day worked.

Claimant's attorney advised at preliminary hearing that claimant has stipulated to a lack of notice within ten days. This stipulation leaves the only issue to be determined as "just cause" under K.S.A. 44-520. When just cause is provided to justify a worker's failure to give notice within ten days as is required by K.S.A. 44-520, then the time for providing notice is extended to 75 days from the date of accident. It was stipulated that claimant gave notice of accident to respondent on December 19 and provided timely written claim of accident on January 6, 2002. Both fall within the 75-day time frame.

Certain factors to be considered in determining whether just cause exists include:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware they have sustained either an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1 (currently, K.A.R. 51-12-2).

Russell v. MCI Business Services, No. 201,706, 1995 WL 712402 (Kan. WCAB Oct. 9, 1995).

Claimant's accident, in this instance, appears to have developed over a several-month period. It is noted that claimant experienced a couple of incidents where his shoulder popped, but neither incident was significant enough to keep claimant from performing his regular duties with respondent.

Claimant was aware that he had suffered an incident when his shoulder popped, but testified that he was unaware that he was suffering a series of accidents on the job. Claimant had been advised by Dr. Naldoza that he suffered from arthritis or bursitis in the shoulder, and did not make the work-related connection to his ongoing injury for several months.

As stated above, claimant's symptoms came on gradually and continued to get worse through his November 30, 2001 last day with respondent.

However, claimant should have been aware of the requirements of reporting an accident, as the employee handbook provided to claimant and all other employees stated that notice was required within ten days of accident. Additionally, Mr. Braland testified that the appropriate workers' compensation posters were on the bulletin board at their place of employment for all employees to see.

The Board finds claimant was aware or should have been aware of the ten-day notice rule. However, in this instance, it is apparent that claimant was unaware that he had suffered a work-related accidental injury. Therefore, it would have been impossible for him to provide notice of accident until he was advised of the cause of his ongoing pain. This medical diagnosis did not happen until December 5, 2001, with Dr. McCue. The Board

finds that claimant had just cause for failing to provide notice within ten days and, therefore, the notice of December 19, 2001, would be timely under K.S.A. 44-520. The Board finds that the Order of the Administrative Law Judge awarding benefits in this matter should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated June 20, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation